Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1994

MICHAEL RIGGS
Petitioner
vs.
SCINDIA STEAM NAVIGATION COMPANY, LTD.
and
THE SHIPPING CORPORATION OF INDIA, Ltd.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can a ship be held liable for negligence under §5(b) of the LHWCA, 33 U.S.C. §905(b) when ship's officers knew or should have known that cargo was being loaded and stowed hazardously yet failed to intervene resulting in an open and obvious danger to off-loading longshoremen which could not have been avoided by due care?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner Michael Riggs ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit entered on December 20, 1994 affirming the District's Court grant of summary judgment in favor of respondents.

The District Court Order granting summary judgment was based on an erroneous understanding of law. Hence the Ninth Circuit affirmation of that order is likewise erroneous.

The District Court's ruling was based completely on its legal conclusion that negligent cargo stowage can never serve as the basis for a §905(b) action against the vessel where the cargo defects were open and obvious yet unavoidable.

Howlett v. Birkdale Shipping Company, S.A. 512 U.S. _____, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994) clearly resolved this issue in favor of petitioner. This Court held that conditions of cargo are like conditions of the ship and its equipment such that liability may result from active vessel negligence in overseeing cargo loading. Howlett was remanded for further factual findings to determine whether or not the vessel was culpable for its active negligence concerning the hazardous cargo conditions.

Riggs has been given no such chance. Instead his claim has been summarily denied based on an erroneous legal ruling and rationale rejected by this Court.

Apparently this Court's clear holding concerning the liability of a negligence action where the ship actively erred in creating dangerous stowage conditions is unresolved, at least in the context of open and obvious conditions. The Ninth Circuit apparently does not understand this concept and presumably the conflict which previously existed between the Circuits as to whether conditions of stowage

can serve as the basis of § 905(b) liability remains unresolved.

OPINIONS BELOW

The Order of the Ninth Circuit denying petitioner's Petition For Rehearing and Rehearing En Banc is unpublished and reproduced in the appendix beginning at page 1a. The Order of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court for the Central District of California upon remand is officially reported at 35 F. 3d 1466 (1994) and is reproduced in the Appendix beginning at page 2a.

The Order of the United States Supreme Court vacating the Ninth Circuit Opinion reported at 8 F 3d 1442 (1993) is officially reported at ___U.S. ___, 114 S. Ct. 2701, 129 L. Ed. 2d 830 (1994) and is reproduced in the Appendix beginning at page 3a.

The Order of the United States Court of Appeals for the Ninth Circuit reversing the decision of the United States District Court for the Central District of California is officially reported at 8 F. 3d 1142 (1993) and is reproduced in the Appendix beginning at page 4a.

The Order of the United States District Court for the Central District of California

granting summary judgment against petitioner is not officially reported and is reproduced in the Appendix beginning at page 19a.

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit was entered on September 30, 1994. Petitioner petitioned for rehearing and rehearing en banc and by order filed November 22, 1994, the petition was denied. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 5(b) of the LHWCA, 33 U.S.C. §905(b) is reproduced as follows:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of §933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons

engaged in providing stevedoring services to the vessel....The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

This case arises from injuries sustained by petitioner MICHAEL RIGGS, a longshoreman, while unloading the vessel M/V JALAGOPAL in 1989. Petitioner sued respondents, the owner and time charterer of the vessel, after he slipped and fell on a cargo of steel pipe. The cargo was in obvious disarray and appeared to have been dumped into the cargo hold without any order or cargo separation thereby preventing formulation of a reasonably safe discharge plan. Undisputed testimony in the District Court established that the longshoremen were forced to discharge the cargo, doing the best they could, in the face of unavoidable hazards to their safety caused by the dangerous stow. The undisputed evidence, credited by the Court, also established that the cargo was originally stowed in an unsafe manner and that the vessel's officers must have known of the danger. Further, the ship's officers could and should have required that the loading be done in a

reasonably prudent and safe manner but failed to do so.

Despite these facts, the District Court held that a condition of stowage cannot be the basis of a §905(b) action where the stowage conditions are "open and obvious". This is because the stowage is neither the ship nor its equipment and therefore not within the range of hazards for which the ship's officers may be held accountable.

Petitioner having filed suit against the vessel under 33 U.S.C. §905(b) and 28 U.S.C. §1332, the District Court granted the vessel's motion for summary judgment. The Ninth Circuit Court of Appeals reversed. Respondents petitioned for Writ of Certiorari to the United States Supreme Court and the petition was granted. The Supreme Court vacated the Ninth Circuit's decision and ordered the case be reconsidered upon remand in light of Howlett. On remand, the Ninth Circuit affirmed the District Court's order granting summary judgment.

REASONS WHY THE PETITION SHOULD BE GRANTED

1. THE ISSUE OF WHETHER CARGO CONDITIONS UNDER ANY CIRCUMSTANCES MAY SERVE AS THE BASIS FOR A §905(b) ACTION IS UNRESOLVED OR MISINTERPRETED DESPITE THE DECISION IN HOWLETT.

A. This Court Expressly Held That Cargo Conditions May Serve As The Basis For A §905(b) Action.

The District Court ruling in the instant case was based on a single legal premise: that conditions of stowage can never, under any circumstances, be the basis of a §905(b) action for personal injuries by a longshoreman when the danger is open and obvious. This Court, in Howlett, expressly rejected that interpretation of existing law.

The issue originally arose because this Court's decision in Scindia Steam Navigation Company v. De Los Santos, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981) set forth the vessel's duties in the following manner:

> " The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails to at least to warn the stevedore of

> hidden dangers which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman."

Id. at 167, 68 L.Ed. 2d at 12. (Emphasis added.)

Subsequently, the Ninth Circuit decided Turner v. Japan Lines, Ltd., 651 F. 2d 1300 (9th Cir. 1981), cert. denied, 459 U.S. 967, 103 S. Ct. 294, 74 L.Ed. 2d 278 (1982). One of the issues in Turner was whether a concealed cargo defect (as opposed to the ship and its equipment) could create liability for the shipowner. The Ninth Circuit held that the vessel's duty encompasses, under certain circumstances, the condition of cargo stowage.

> We hold, therefore, that the vessel had a duty to protect the plaintiff [off-loading longshoreman] against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of.

Id. at 1304.

The Fifth Circuit agreed with the Ninth Circuit in Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981) and held that the open and obvious character of the stowage would not, ipso facto, change the character of the vessel's obligation to turn over the ship in a reasonably safe condition. Moreover, it made little sense to

do so. Since the ship could be held at fault for failing to act upon a hidden or concealed defect, that duty should be just as strong if not stronger when the vessel had actual or constructive knowledge that the loading was done improperly and could have intervened in time to prevent the danger.

In the Third Circuit, however, the Court held that the vessel has no duty to supervise the loading of cargo or to inspect the stowage of cargo and further, in misreading Scindia found that the vessel's duties in any event were limited to the ship and its gear and equipment, not the cargo stowage. Derr v. Kawasaki Kisen K.K. 835 F.2d 490, 495 - 6 (3rd Cir. 1987).

In Howlett, this Court undertook to clarify Scindia and instruct the Circuits as to whether or not cargo conditions fall within the purview of the ship's responsibilities and under what circumstances. Although Howlett unquestionably involves a different duty than that implicated in Riggs, that is, the duty to warn rather than the duty to turn the ship over in a reasonably safe condition, the issue of whether cargo conditions could constitute a basis for ship liability was nonetheless addressed in a universal manner. The Court said:

> "Most turnover cases brought under §5(b) concern the condition of the ship itself or

of equipment on the ship used in stevedoring operations. See, e.g., Bjaranson v. Botelho Shipping Corp., Manila, 873 F. 2d 1204 (CA9 1989) (no handhold on coaming ladder); Griffith v. Wheeling-Pittsburg Steel Corp., 610 F. 2d 116 (CA3 1979) (defective hatch covers), remanded, 451 U.S. 965, 101 S. Ct. 2038, 68 L. Ed. 2d 343, reinstated, 657 F. 2d 25 (CA3 1981), cert. denied, 456 U.S. 914, 102 S. Ct. 1767, 72 L. Ed. 2d 173 (1982); Scalafani v. Moore McCormack Lines, Inc., 388 F. Supp. 897 (EDNY) (no handrail on platform linking gangway and deck), aff'd without opinion, 535 F. 2d 1243 (CA2 1975). The turnover duty to warn, however, may extend to certain latent hazards in the cargo stow. This is so because an improper stow can cause injuries to longshoremen, see e.g., Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956); Clay v. Lykes Bros.
S.S. Co., 525 F. Supp. 306 (ED La. 1981); The Etna, 43 F. Supp. 303 (ED Pa. 1942), and thus is among the "hazards on the ship" to which the duty to warn attaches. Scindia Steam, 451 U.S., at 167, 101 S. Ct., at 1622."

114 S. Ct. 2064. (Emphasis added)

The Supreme Court continued in Howlett to define what the "precise contours" of the duty to warn of latent hazards in the cargo stow were with regards to the stevedores and the vessel. As to the duty to warn, only latent hazards i.e. non-obvious conditions are implicated. This is the case since it is well-settled that no duty to warn arises from a condition that is equally apparent to the stevedoring company. Further, the Court held that there was no duty to inspect or supervise the loading operations to uncover defects that would be hidden in the stowage. However, under certain circumstances, such as where the ship officers had actual knowledge of the dangerous condition, liability might still attach. Ibid.

Thus, the Court held unequivocally that cargo conditions and not merely the "ship and its equipment" may, under certain circumstances be the basis for ship liability.

B. Under Howlett, A Vessel Owner's Liability For Dangerous Cargo Conditions Arises Upon Its Actual Or Constructive Knowledge Of The Defects.

In Howlett, this Court continued to define those circumstances under which a vessel could be held responsible for cargo defects. While the

vessel has no general duty to inspect or supervise the loading stevedore's operations, Howlett clearly states that if the vessel knew or reasonably should have known that the cargo was being stowed improperly, plaintiff could state a claim for vessel negligence.

> "We turn to the proper disposition of this case. As the Court of Appeals did not issue an opinion, we have before us only the District Court's statement of its reasons for granting summary judgment in favor of Birkdale. The vessel having been under no obligation to supervise and inspect the cargo loading operations, and no other theory for charging the vessel with constructive knowledge having been advanced, the District Court was correct to inquire whether the vessel had actual knowledge of the tween deck's condition. The District Court found it undisputed that there was no actual knowledge. At this stage of the proceedings, however, we cannot conclude that summary judgment can rest on this ground. There is sufficient evidence in the record to support a permissible inference that, during the loading process, some crew members, who might have held positions such that their knowledge should be attributed to the vessel, did in fact observe the plastic on the tween deck. And the District

> Court's alternate theory that even if some crew members were aware of the condition during loading operations, then the condition also would have been open and obvious to a stevedore during unloading operations, may prove faulty as well, being premised on the state of affairs when the vessel took on cargo, not during discharge at the port where Howlett was injured."

Id. p. 2067. (Emphasis added)

Petitioner has been locked out of court with no opportunity to establish liability under the guidelines in Howlett. The District Court credited petitioner's showing that the cargo was unsafely stowed and that the ship's officers "must have known of the danger." Appendix p. 20a.

The open and obvious character of the cargo defects puts petitioner in a much better position to establish those elements of liability set forth in Howlett than those cases in which the alleged defect is hidden. This is because if the defect is obvious at the time of the loading, the ship's officers must be actually or constructively aware of the hazards being created and in a position to act responsibly and remedy the hazards. Moreover in Riggs the District Court found that the ship's officers "must have known of the danger". As this Court

has concluded, failure to take responsible remedial action is actionable negligence.

C. The Open And Obvious Character Of The Stow Defects Does Not Defeat Liability

Howlett involved hidden defects in the stowage. The instant case involves dangers which were at all times open and obvious. As the District Court acknowledged and as settled authority provides, the open and obvious character of the defects does not absolve the shipowner of responsibility where the dangers cannot be avoided by reasonable care. Martinez v. Korea Shipping Corp., Ltd., 903 F. 2d 606 (9th Çir. 1990); Lemon, supra. p. 116.

II. PETITIONER HAS BEEN FORECLOSED FROM PURSUING A MERITORIOUS CLAIM IN CONTRAVENTION OF THIS COURT'S DECISION IN HOWLETT

Howlett was remanded to the District Court for further factual findings. In so ordering, the Court made clear that a plaintiff may state a claim for negligence against a vessel under §905(b) when the vessel is actively negligent in cargo operations. Vessel negligence may occur, in the precise facts of the instant case, where the shipowner knows or should have known that the cargo stowing process is dangerously deficient, has the power and opportunity to intervene effectively and fails to so. That duty

encompasses those hazards that are "known to the vessel or should be known to it in the exercise of reasonable care". Scindia at 451 U.S. 167 quoted in Howlett at 2067.

In the instant case, the District Court found as follow:

> "Plaintiff does present respectable opinion testimony that the cargo was originally wrapped in an unsafe manner, that the wrapping compounded the danger, and that the vessel JALAGOPAL's officers must have known of the danger. If this opinion was relevant, it would prevent the granting of summary judgment inasmuch as the obvious nature of the danger would not preclude liability for an unsafe condition of the ship or equipment."

Order Granting Summary Judgment, Appendix pp. 20-21a. (Emphases added.)

The Ninth Circuit should have remanded Riggs to the District Court for further factual finding exactly as this Court ordered in Howlett. Riggs may or may not be able to provide the requisite proof but, under Howlett, he must be given the opportunity. Instead, the Ninth Circuit foreclosed Riggs from presenting facts consistent with liability under Howlett and, worse yet, did so by affirming a rule of law which was rejected

in Howlett. Nothing in Howlett indicates that dangerous loading and storing of cargo in the context of an open and obvious hazard can never serve as the basis of ship liability. To the extent that Howlett addresses that issue, it concludes that Riggs could state an actionable claim if the vessel knew or reasonably should have known of the danger being created.

Howlett concerned latent danger. The ship duty implicated was the duty to warn the off-loading stevedores of the hazards. Presumably, upon notice, the stevedores could have taken reasonable precautions to avoid the danger.

The instant case involves the turnover duty of due care, that "a shipowner must exercise ordinary care to maintain the ship and its equipment in a condition so that an expert and experience stevedore can load and unload cargo with reasonable safety." Howlett p. 2061. Where the vessel knowingly permits a dangerous stowage to develop, it is not relieved of liability simply because the danger is open and obvious if the longshoremen cannot, by exercise of reasonable care, eliminate the danger. Martinez, supra, p. 609; Treadaway vs. Societe Anonyme Louis - Dreyfus, 894 F. 2d 161, 167 (5th Cir. 1990); Ollestad vs. Greenville S.S. Corp., 738 F. 2d 1049 (9th Cir. 1984) (holding that a jury instruction finding the shipowner liable despite the obviousness of the hazard was appropriate); Tragni vs. Establissment Maritime Camille, 705

F. 2d 92, 94 (2d Cir. 1983). (Reliance on the stevedores to safely work dangerous cargo not a defense); Giglio v. Farrell Lines, Inc., 613 F. 2d 429, 432-433 (2d Cir. 1980) ("[t]he sine qua non of a ship's liability for an obviously dangerous condition arising during the process of loading or unloading is the reasonable anticipation that the longshoremen will be able to avoid it"); and Harris v. Flota Mercante Grancolombiana, S.A., 730 F. 2d 296, 299 (5th Cir. 1984) (holding that a vessel is not relieved as a matter of law of all responsibility because the danger is obvious). Ludwig v. Pan Ocean Shipping Company, Ltd., 941 F. 2d 849, 851 (9th Cir. 1991).

Simply put, Riggs is entitled to his day in Court. Active vessel negligence in the creation of a hazardous stow remains a viable basis for liability under Howlett. Like Howlett, Riggs must be permitted to make a factual showing before the District Court that the vessel knew or should have known of the hazard being created in the stowage, had an opportunity to effectively intervene and failed to do so thereby breaching its duty to turn over the vessel in reasonably safe condition.

CONCLUSION

For these reasons, petitioner respectfully requests that a Writ of Certiorari issue to review the judgment below.

Dated: 2/9/95 Respectfully submitted,

LAW OFFICES OF DIANE L. MIDDLETON

Marc Coleman, Of Counsel
Attorneys for Petitioner
MICHAEL RIGGS

No. 92-55139
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL RIGGS,
Plaintiff-Appellant,

v.

SCINDIA STEAM NAVIGATION CO., LTD. & THE SHIPPING CORPORATION OF INDIA
Defendants-Appellees.

D.C. No. CV-90-4812-HLH

ORDER

Petition For Rehearing And Rehearing En Banc

BEFORE: HARLINGTON WOOD, JR., *STEPHEN REINHARDT, AND PAMELA ANN RYMER, Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Rymer have voted to reject the suggestion for rehearing en banc and Judge Wood so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Harlington Woods, Jr., Senior United States Circuit Judge, Seventh Circuit Court of Appeals, sitting by designation.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL RIGGS,
Plaintiff-Appellant,
v.
SCINDIA STEAM NAVIGATION CO., LTD., and THE SHIPPING CORPORATION OF INDIA,
Defendants-Appellees.

No. 92-55139
D.C. No. CV-90-4812-HLH
ORDER

On Remand from the United States Supreme Court

Filed September 30, 1994

Before: Harlington Wood, Jr.,* Stephen Reinhardt, and Pamela Ann Rymer, Circuit Judges.

ORDER

The Supreme Court vacated our opinion, reprinted at 8 F.3d 1442, and remanded the case to this court for further consideration in light of *Howlett v. Birkdale Shipping Co., S.A.*, 114 S. Ct. 2057, 2064 (1994). Accordingly, consistent with the *Howlett* decision, we now affirm the district court's grant of summary judgment to the vessel. The district court's decision is

AFFIRMED.

*Honorable Harlington Wood, Jr., Senior United States Circuit Judge, Seventh Circuit Court of Appeals, sitting by designation.

SUPREME COURT OF THE UNITED STATES

NO. 93-1293

SCINDIA STEAM NAVIGATION COMPANY AND SHIPPING CORPORATION OF INDIA,

PETITIONERS

vs.

MICHAEL RIGGS

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit,

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Howlett v. Birdale Shipping Co., S.A., 512 U.S. _____ (1994).

IT IS FURTHER ORDERED that the petitioner, Scindia Steam Navigation Company and Shipping Corporation of India recover from Michael Riggs ($300.00) Three Hundred Dollars for its costs herein expended.

June 20, 1994

Clerk's costs: $300.00

MICHAEL RIGGS, *Plaintiff-Appellant,*

v.

SCINDIA STEAM NAVIGATION COMPANY and the Shipping Corporation of India, Defendants-Appellees.

No. 92-55139.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 15, 1993
Decided Nov. 8, 1993

Longshoreman injured while unloading cargo brought action under Longshore and Harbor Workers' Compensation Act (LHWCA) against vessel owner and time charterer alleging negligent failure to provide reasonably safe place to work. The United States District Court for the Central District of California, Harry L. Hupp, J., granted summary judgment for defendants, and longshoreman appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that longshoreworker who is injured on board vessel while off-loading cargo stowed in open and obviously hazardous manner by foreign stevedores may maintain negligence action under LHWCA against vessel.

Reversed and remanded.

Rymer, Circuit Judge, filed concurring opinion.

1. Shipping — 84(6)

Provision of Longshore and Harbor Workers' Compensation Act under which longshoreworkers retain statutory action against vessels for negligence does not prohibit vessel from obtaining recovery against foreign on-loading stevedore and does not allocate liability between those two entities. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

2. Shipping — 84(3.2)

For purpose of determining liability to longshoreworker under Longshore and Harbor Workers' Compensation Act (LHWCA), vessel's turn over duty of safe condition extends to concealed cargo hazards created by foreign on-loading stevedores. Long-

shore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

3. Shipping — 84(3.2)

For purpose of determining vessel's liability in negligence to longshoreworker under Longshore and Harbor Workers' compensation Act (LHWCA), vessel is not relieved as matter of law from its duty to turn over safe cargo stow merely because hazardous condition is open and obvious. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

4. Shipping — 84(5)

Neither assumption of risk nor contributory negligence is defense under Longshore and Harbor Workers' Compensation Act (LHWCA). Longshore and Harbor Workers' Compensation Act. § 5(b), 33 U.S.C.A. § 905(b).

5. Shipping — 84(5)

Vessel may not defend negligence suit brought against it by longshoreworker under Longshore and Harbor Workers' Compensation Act (LHWCA) on ground that injured longshoreworker should have refused to continue working in face of obviously dangerous condition. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

6. Shipping — 84(3.2)

Vessel has duty to take necessary steps to protect longshoreworkers against open and obvious cargo defects and not just concealed ones. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b).

7. Shipping — 50,84(3.2)

Longshore worker who was injured on board vessel while offloading cargo stowed in open and obviously hazardous manner by foreign stevedores could maintain negligence action against vessel owner and time charterer. Longshore and Harbor Workers' Compensation Act, § 5(b), 33 U.S.C.A. § 905(b),

Marc Coleman, Middleton & Coleman, San Pedro, CA, for plaintiff-appellant.

Dawn Schock, Keesal, Young & Logan, Long Beach, CA, for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before: WOOD, Jr.,* REINHARDT, and RYMER, Circuit Judges.

REINHARDT, Circuit Judge:

We decide here that longshoreworkers who are injured on board vessels while off-loading cargo stowed in an open and obviously hazardous manner by foreign stevedores may maintain negligence actions against the vessels. The district court reached a contrary conclusion. Accordingly, we reverse the grant of summary judgment to the vessel, and remand.

I. Background

On October 2, 1989, Michael Riggs sustained injuries while working as a longshoreman for Stevedoring Services of America. Riggs and his longshore gang were assigned to unload cargo from the M/V Jalagopal. The Jalagopal was owned by Scindia Steam Navigation Company, Ltd. ("Scindia") and time-chartered by The Shipping Corporation of India ("SCI"). The vessel's cargo which had been loaded overseas by a foreign stevedore, consisted of three-inch steel pipe tubing bundle together and covered with slippery plastic wrapping. There was uncontested evidence, including expert testimony, that the on-loading stevedore had improperly stowed the cargo and that the pipes were strewn throughout the hold in an openly and obviously hazardous manner.[1] Riggs injured his back when he slipped between two pipe bundles during the unloading operations.

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*Honorable Harlington Wood, Jr., Senior United States Circuit Judge, Seventh Circuit Court of Appeals, sitting by designation.

[1]The pipes were stowed without dunnage (loose materials placed within the cargo to keep it from shifting) or shoring (vertical supports).

Riggs brought suit against Scindia and SCI (collectively "the vessel")[2] under section 5(b) of the Longshore and Harbor Workers' Ccompensation Act ("LHWCA"), 33 U.S.C section 905(b), claiming that the owner and the time-charterer of the Jalagopal had negligently failed to provide him a reasonable safe place to work. Riggs contended that the vessel's negligence consisted of its failure to supervise properly the cargo loading operations of the foreign stevedore. The district court granted summary judgment to the vessel on the basis that it had no legal duty to prevent or alleviate the unsafe conditions in the cargo hold, because the dangers were open and obvious to the longshoreworkers. We have jurisdiction under 28 U.S.C. section 1291, and we review the grant of summary judgment *de novo*.

II. Legal Framework

A. The 1972 Amendments to the LHWCA

Prior to 1972, vessels were strictly liable under the maritime doctrine of unseaworthiness for any injuries sustained by longshoreworkers due to unsafe on-board conditions. Although absolutely liable to the injured longshoreworkers, vessels were able to shift the cost by suing the stevedore-employers on the theory that they had breached an expressed or implied warranty of workmanlike performance. Because this sytem resulted in much unnecessary litigation. Congress amended the LHWCA in 1972 in an attempt to bring it into conformity with the practical realities of the maritime world. *See* H.R. Report No. 1441, 92 Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4698, 4702-04 (describing purpose of P.L. 92-576, Oct. 27, 1972, 86 Stat. 1251).[3]

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[2]As explained *infra*, section 5(b) of the LHWCA establishes the liability of "vessels" to injured longshoreworkers. Because a "vessel" includes its owner and charterer, both Scindia and SCI are potentially liable to Riggs. *See* 33 U.S.C. § 902(21); *see also Carpenter v. Universal Star Shipping S.A.*, 924 F.2d 1539. 1542 (9th Cir. 1991) (same standards of care apply to shipowners and charterers). The question of any contractual indemnity between Scindia and SCI is not before us.

[3]The Senate Report, S. Report No. 1125, is identical in all relevant respects to the House Report.

[1] The 1972 amendments gave longshoreworkers a no-fault workers-compensation remedy against their stevedore-employers. 33 U.S.C. § 904. The amendments abolished a vessel's absolute liability to an injured longshoreworker under the unseaworthiness doctrine, but retained a statutory action against vessels for *negligence*. § 905(b).[4] In addition, the amendments barred vessels from seeking indemnity from the longshoreworker's "employer". *Id.* However, an "employer" is defined in such a way as to exclude foreign stevedores. *See* § 902(4). Thus, by its terms section 905(b) does not prohibit a vessel from obtaining a recovery against a foreign on-loading stevedore and does not allocate liability between those two entities.

The House Report states that the result of the 1972 amendments would be "to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third-party damages action is concerned." 1972 U.S.C.C.A.N. at 4703. The Report concludes:

> Permitting actions against a vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

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[4] That section provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone else entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this section and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

Section 933 *inter alia* provides that in certain situations the stevedore-employer is assigned the longshoreworker's right to sue the vessel for compensation. *See Carpenter*, 924 F.2d at 1541-42.

Id. at 4704. However, Congress did not specify the conditions under which a vessel could be liable for a breach of its duty of care, but instead left this task for the courts to resolve through the "application of accepted principles of tort law and the ordinary process of litigation." *Id.* The courts have proceeded to accept that responsibility, and this decision simply constitutes one further step in that process.

B. A Vessel's Duties to a Longshoreworker

Any discussion of the scope of the duties imposed by section 905(b) must begin with *Scindia Steam Navigation Company, Ltd. v. De Los Santos,* 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). In *De Los Santos,* a longshoreman was injured while loading cargo into the ship's hold. The cargo fell from a pallet suspended by a winch, which was part of the ship's gear. The winch's braking mechanism had allegedly been malfunctioning for two days prior to the accident. In defining the vessel's duty of reasonable care under the circumstances the Court drew a line between "turn over" duties, which arise before the vessel is turned over to the stevedore and its longshoreworkers, and the other duties that arise after the vessel is turned-over. The case before us involves only the first type of duty — that which arises prior to turn over.

De Los Santos determined that a vessel's turn over duties extend *at least* to: 1) having the ship, its equipment, gear and tools, and the work space to be used in stevedoring operations in such condition that an experienced stevedore can by exercising reasonable care carry on its cargo operations with reasonable safety ("the turn over duty of safe condition"); and, 2) warning the stevedore of *hidden* dangers that are known to the vessel or should have been known to it in the exercise of reasonable care with respect to any hazards on the ship, in its equipment, gear or tools, or in the work space ("the turn over duty to warn"). 451 U.S. at 167, 101 S.Ct at 1622; *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1207 (9th Cir.1989). It is the first turn over duty (safe condition) that is at issue here.

Riggs contends that the turn over duty of safe condition extends to cargo hazards that exist at the time of turn over, both "open

and obvious" and concealed. The vessel argues that under *De Los Santos* and the law of this circuit the turn over duty of safe condition extends only to the vessel and its equipment and not to its cargo at all.[5] The vessel is clearly wrong, at least in part. Ninth Circuit precedent squarely holds that the turn over duty of safe condition encompasses *concealed* hazards in cargo on-loaded by foreign stevedores. *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir.1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 294, 74 L.Ed.2d 278 (1982). Therefore, the only question for us to resolve is whether it extends to open and obvious defects in such cargo as well. We hold that it does.

III. Discussion

A. *Turner v. Japan Lines* Holds that the Turn Over Duty of Safe Condition Extends to Concealed Cargo Hazards Created by Foreign On-Loading Stevedores.

[2] In *Turner*, which was decided several months after *De Los Santos*, we rejected the argument that a vessel's turn over duties do not extend to the cargo stow. *Turner* involved an off-loading longshoreworker who was injured when a stack of plywood collapsed beneath him. Expert testimony indicated that the plywood had been improperly stowed by the on-loading foreign stevedore. We held that the vessel could be sued for failing to "protect" the injured longshoreworker against concealed cargo dangers, created by a foreign on-loading stevedore, of which the vessel knew or should have known, and which the vessel could, in the exercise of

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[5] In discussing the scope of the turn over duties in *De Los Santos*, the Supreme Court explicitly stated that the duty to warn extends to the "work space" but also implied that the duty of safe condition does so as well. *See* 451 U.S. at 167, 101 S.Ct. at 1622. Several circuits have concluded that the duty of safe condition extends to the "work space", but there is some disagreement as to whether the cargo falls within the term "work space". *Compare Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir.1986) (turn over duty of safe condition extends to ship's work space, which includes cargo) *with Kirsch v. Plovidba*, 971 F.2d 1026, 1031 n. 7 (3d Cir.1992) (turn over duty of safe condition applies to "physical work space" but not cargo). As explained in text, Ninth Circuit law is in accord with that of the Fifth Circuit.

reasonable care, have "corrected" or warned of.[6] *Id.*, 651 F.2d at 1304.

Our statement in *Turner* that a vessel has a duty to "correct" concealed dangers in the cargo before turning the vessel over to the off-loading stevedore makes clear that our decision there encompassed the turn over duty of safe condition as well as the turn over duty to warn. Moreover, we have subsequently described *Turner* as setting forth a vessel's duty "to make the ship safe for longshoremen before turning the ship over to the stevedore." *See Ollestad v. Greenville Steamship Corp.*, 738 F.2d 1049, 1052 & n. 2 (9th Cir.1984); *see also Martinez v. Korea Shipping Corp., Ltd.*, 903 F.2d 606, 610 n. 2 (9th Cir.1990) (citing *Turner* in the context of a discussion of the turn over duty of safe condition).

In the decision we review here, the district court correctly recognized that *Turner* addressed the turn over duty of safe condition but erroneously limited the *Turner* rule to *concealed* cargo defects. The district judge stated:

> While *Turner, supra,* involved liability created by a condition of the stow, the facts of *Turner* involved a concealed defect and not an "open and obvious" one. Plaintiff has failed to cite any Ninth Circuit authority wherein the shipowner has been held liable for an unsafe condition of the cargo which was open and obvious to the longshoremen working the hold.

The district court was correct that there is no direct Ninth Circuit authority on point. Rather our decision is dictated by the logic of our precedents.

Turner's holding that the turn over duties of safe-condition and warning encompass non-obvious dangerous conditions in stowed cargo rested on our conclusion that such a rule would further the

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[6]Because the case before us, like *Turner*, involves a *foreign* on-loading stevedore, we have no occasion to decide, and express no opinion regarding, whether a vessel has a duty to correct or warn of dangers (whether concealed or open and obvious) created by a domestic on-loading stevedore who is not the employer of the off-loading longshoreworkers.

Congressional goal of safety that underlies the LHWCA. 651 F.2d at 1304. We reasoned that neither the off-loading longshoreworker nor his stevedore-employer could exercise any control over the on-loading foreign stevedore. Only the vessel could do so, by choosing a reliable foreign stevedore, supervising its work when necessary, and correcting concealed dangers or warning the off-loading stevedore of them. *Id.* Moreover, we noted that in many cases, the injured worker could not sue the foreign stevedore, who would be beyond the reach of the processes of a federal district court. All of these factors are equally applicable in the case of an open and obvious cargo defect.[7]

We noted in *Turner* another factor that is also equally applicable to both types of *cargo defects*. We recognized that section 905(b) does not bar a shipowner from recovering against a foreign stevedore, who is not an "employer" within the meaning of the LHWCA, where the stevedore is primarily at fault for the off-loading longshoreworker's injuries. 651 F.2d at 1303-04. As we recently stated in *Carpenter v. Universal Star Shipping SA*, where we reaffirmed our holding and reasoning in *Turner*: "The prospect of vessel-initiated actions against foreign stevedores provides foreign stevedores with an incentive to do their work carefully." 924 F.2d 1539, 1544 (9th Cir.1991).[8]

Turner and *Carpenter* are fully consistent with *De Los Santos*. *Turner* simply resolves an issue not before the Court in the earlier case and *Carpenter* endorses that action. Because the accident in *De Los Santos* occurred while the domestic stevedore was *loading*

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[7]Because the injury in *Turner* was caused by a concealed cargo defect, there was simply no reason for us to discuss whether the same principle applies to open and obvious ones.

[8]In *Carpenter* we described *Turner* as holding vessels liable for their failure to "intervene" to protect the longshoreworker. 924 F.2d at 1539. Our use of the term "intervene" in *Carpenter* is somewhat confusing because, the "duty to intervene" is technically a post-turn over duty, *see, e.g., Bjaranson*, 873 F.2d at 1207, and *Turner* involved a ship's duties at the time of turn over. Nevertheless, our intent to hold vessels liable for their negligence in connection with the actions of foreign on-loading stevedores and our reasons for doing so are clear.

cargo onto the vessel and the alleged negligence pertained to the vessel's equipment, the Supreme Court simply had no reason to consider the scope of a vessel's turn over duties with respect to improperly stowed cargo, let alone cargo improperly stowed *before* stevedoring operations began.[9]

The vessel incorrectly asserts that *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984), holds that the turn over duty of safe condition does not extend to defects in the cargo. In *Taylor*, a longshoreman was injured when he fell while unloading mung beans. The bags containing the beans were torn, and as the longshoreworkers unloaded cargo, the beans blew onto the deck, eventually causing Taylor to fall. After a bench trial, judgment was entered for the vessel. The district court specifically found that the turn over duty of safe condition had *not been breached* because the stowage of the bags was not unreasonably dangerous. 739 F.2d at 1386. We affirmed.

The vessel misconstrues our statement in *Taylor* that the turn over duty of "safe condition focuses on the character of the ship and its equipment — not on the nature of the cargo", *id.*, as a holding that that duty does not apply to cargo defects. This sentence must be read in light of our conclusion that the cargo constituted a safe stow and did not become dangerous until hazardous conditions arose following the commencement of the off-loading stevedore's operations and the off-loading stevedore then acted unreasonably in the face of those conditions. If, as the vessel argues, the duty to turn over a vessel in safe condition does not include the cargo, then in *Taylor* we would not have determined that the cargo was not stored in a dangerous manner. We simply would have held that the vessel was immune as a matter of law from liability under a duty of safe condition theory because a cargo defect was the cause of the longshoremen's injuries.

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[9]Moreover, *De Los Santos* was primarily concerned with a dangerous condition that *developed* during cargo operations *after* the stevedore had taken control. *See Ollestad*, 738 F.2d at 1052; *accord Kirsch v. Plovidba*, 971 F.2d 1026, 1029 (3d Cir.1992) (*De Los Santos* turns on duty of ship's crew to intervene after stevedore has begun cargo operations); *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 298 (5th Cir.1984) (same).

In *Taylor*, we concluded that the reason that the unloading longshoreman was not entitled to assert a claim against the shipowner under the turn over duty of safe condition was because

> [t]he torn sacks of beans, lying in the hold posed no threat; it was only when the cargo discharge began and the wind blew the beans on the deck and winch platform that a hazardous condition developed. Thus, it was not the torn sacks but the stevedore's subsequent failure to take appropriate precautions in the course of the operation that created the danger.

Id., 739 F.2d at 1386.[10] *Taylor* is clearly distinguishable from the present case because there the stevedore-employer's own subsequent negligence created the hazard; here, is is the vessel's and the foreign stevedore's that is allegedly the cause. For the purpose of the case before us, both parties agree that the off-loading stevedore was not negligent in performing its cargo operations. Because it is undisputed for purposes of this appeal that the cargo was stowed negligently before the vessel was turned over to the off-loading stevedore, *Turner* and not *Taylor* is controlling.

B. A Vessel is Not Relieved as a Matter of Law From its Duty to Turn Over a Safe Cargo Stow Merely Because The Hazardous Condition is Open and Obvious.

[3] *Turner* establishes the proposition that the turn over duties of safe condition and of warning encompass *concealed* dangers in a cargo stow.[11] The remaining question is whether the fact that the defective condition of the cargo was open and obvious warrants a different result. The district court concluded that it

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[10]In *Taylor* we also rejected the longshoreworker's allegations that the vessel breached its post-turn over duties of intervention, active involvement, and control — duties not at issue here.

[11]Fifth and Eleventh Circuit law is in accord with our own. E.g., *Lemon v. Bank Lines Ltd.*, 656 F.2d 110, 116 (5th Cir. Unit A. Sep. 1981); *Spence v. Mariehamnms R/S*, 766 F.2d 1504, 1507 (11th Cir. 1985) (per curiam). The Third Circuit takes the contrary position. *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987) (rejecting *Turner*), *cert. denied*, 486 U.S. 1007, 108 S.Ct. 1733, 100 L.Ed.2d 196 (1988). We cited *Lemon* with approval in *Ollestad*, 738 F.2d at 1051.

did, and refused to allow Riggs' claim to go to trial. While Riggs agrees with the district judge that the turn over duty to *warn* applies only to hidden dangers, *see, e.g., De Los Santos*, 451 U.S. at 167, 101 S.Ct. at 1622; *Torres v. Johnson Lines*, 932 F.2d 748, 750 (9th Cir. 1991), he contends that the court erred in holding that the turn over duty of *safe condition* is similarly restricted.

As we noted in our discussion of *Turner, supra* at 1445-46, *all* of the considerations on which we relied in holding that a vessel can be liable for concealed cargo defects are equally applicable in the case of open and obvious defects. The rationale underlying *Turner* simply does not permit the distinction suggested by the vessel. Moreover, we have explicitly held that the obviousness of a non-cargo defect does not absolve the vessel of its duty to turn over the ship to a safe condition — a condition under which expert and experienced stevedores can operate safely. *Martinez*, 903 F.2d at 609-10. In *Martinez*, we expressly held that an *open and obvious* hazard may be unreasonably dangerous and therefore constitute a breach of the turn over duty of safe condition. *Id.* In doing so we rejected the argument that the duty of safe condition does not extend as a matter of law to open and obvious defects — at least insofar as the vessel and its equipment are concerned.[12]

The vessel argues that the rule set forth in *Martinez* is limited to the ship and its equipment and that the duty of safe condition does not apply to "open and obvious" defective cargo stows. We disagree. We can think of no sound reason for drawing such a

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[12]As we noted earlier, *De Los Santos* expressly limits the duty to warn to hidden defects but does not place a similar restriction on the duty of safe condition. *See* 451 U.S. at 167, 101 S.Ct. at 1622. Other courts have recognized this distinction and allowed for actions for injuries caused by open and obvious defects under the duty of safe condition but not under the duty to warn. See *Woods v. Sammisa Co. Ltd.*, 873 F.2d 842, 852 & n. 13 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050, 110 S.Ct. 853, 107 L.Ed.2d 847 (1990); *see also Spence v. Mariehamms R/S*, 766 F.2d 1504, 1507 (11th Cir. 1985) (analyzing hidden versus obvious only as to the duty to warn).

distinction in the case of cargo stows only.[13] The sensible principle *Martinez* enunciates is that a vessel's failure to "correct" an open and obvious defect may constitute unreasonable conduct leading to the imposition of liability. That principle has equal force with respect to hazards in the stowage and hazards occurring elsewhere on the vessel. Moreover, given that under *Turner* vessels already have a duty to supervise the on-loading operations of foreign stevedores to avoid non-obvious cargo defects, there would seem to be little extra burden in requiring them to be alert at the same time to the creation of cargo hazards that are open and obvious.

[4, 5] The vessel suggests that in the case of obvious dangers the longshoreworkers have the opportunity to make a conscious decision to refuse to unload or bring the defects to the attention of the stevedore or vessel. However, the argument is foreclosed by the fact that neither assumption of the risk nor contributory negligence is a defense under the LHWCA. *De Los Santos*, 451 U.S. at 165 n. 13, 101 S.Ct. at 1621. As the *De Los Santos* Court stated, a vessel may not defend a suit brought against it under section 905(b) on the ground that the injured longshoreworker should have refused to continue in the face of an obviously dangerous condition. *Id.* at 176 n. 22, 101 S.Ct. at 1626 n. 22.

[6] For the foregoing reasons, we hold that a vessel has a duty to take the necessary steps to protect longshoreworkers against open and obvious cargo defects and not just concealed ones.[14] Our holding is in accord with the law of the Fifth Circuit

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[13]While it is true that *Martinez* does not refer to cargo, there is no reason that it should have done so since the case involved a defective ladder.

[14]Of course, a plaintiff in a particular case may fail to produce at trial sufficient evidence of an unreasonable danger to support a finding of a *breach* of the turn over duty. *See Ludwig v. Pan Ocean Shipping Co., Ltd.*, 941 F.2d 849, 851-52 (9th Cir. 1991) (per curiam); *Bjaranson*, 873 F.2d at 1208-09. Because "certain dangers that may be hazardous to unskilled persons need not be remedied if an expert and experienced stevedore could safely work around them." *Torres*, 932 F.2d at 751 (internal quotation omitted), it may well be that a particular hazard that is open and obvious may not constitute an unreasonable danger to

on this question. *Woods v. Sammisa Co. Ltd.*, 873 F.2d 842, 848, 850 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050, 110 S.Ct. 107 L.Ed.2d 847 (1990); *Harris v. Flota Merchante Grancolombiana, S.A.*, 730 F.2d 296, 299-300 (5th Cir. 1984). As noted earlier, the Third Circuit takes the position that the turn over duty of safe condition does not encompass *any* cargo-stow defects, whether hidden or obvious. No circuit, however, has adopted a rule similar to that urged by the vessel — that a duty exists as to concealed cargo defects but not as to open and obvious ones. We see no reason to create further confusion in this already complicated area of the law by drawing such an untenable and artificial distinction. Therefore, we join the Fifth Circuit in holding that the duty of safe turn over encompasses open and obvious, as well as concealed cargo hazards.

IV. Conclusion

[7] *Turner* holds that the turn over duty of safe condition extends to concealed cargo defects. *Martinez* holds that that duty applies to open and obvious equipment (and vessel) hazards, as well as to concealed ones. We now complete the circle. Taken together, *Turner* and *Martinez* lead directly and inexorably to the conclusion that a vessel's turn over duty of safe condition extends to protecting against open and obvious cargo hazards. Accordingly, the judgment of the district court is REVERSED and the case REMANDED for further proceedings consistent with this opinion.[15]

REVERSED and REMANDED.

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longshoreworkers. However, that factual issue is separate from the legal question whether there exists a duty to turn over a vessel that does not contain any unreasonably dangerous defects, cargo, or otherwise, open or concealed.

[15]The vessel argues that the award of summary judgment in its favor can be upheld on the basis that Riggs was hired to correct a dangerous stow and that under our decision in *Peters v. Titan Navigation Co.*, 857 F.2d 1342, 1344-45 (9th Cir. 1988), a repairman has no right to recover for injuries caused by the very condition he was hired to fix. The district court properly rejected this theory under the facts of this case.

RYMER, Circuit Judge, concurring:

I concur because the reasoning of *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 294, 74 L.Ed.2d 278 (1982), which holds that a vessel has the duty to protect longshoremen against concealed conditions created by a foreign stevedore, which the vessel could have corrected or warned of, leads inexorably to the conclusion that the vessel has a duty of care with respect to cargo conditions whether the dangers are concealed or not. I write separately to note that until now, the turn over duty has focused on the character of the ship and its equipment, not on the condition of the cargo. *See, e.g., Ludwig v. Pan Ocean Shipping Co.*, 941 F.2d 849 (9th Cir. 1991) (duty to have ship and its equipment safe for stevedore operations); *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984) (vessel not liable for hazards which develop as a result of cargo operations). By the same token, the duty to warn has existed only with regard to hidden or concealed dangers. *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981); *Turner*, 651 F.2d at 1304. By imposing a turn over duty of care to protect stevedores from poor cargo conditions, we are exposing the shipowner to liability equally for lack of reasonable care as to the vessel or the vessel's equipment, and as to the condition of the cargo (at least when stowed by a foreign stevedore). It is unclear that this squares with the restrictive rules of liability of shipowners to stevedores envisioned by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), or with the scope of a shipowner's duties recognized in *De Los Santos*. In any case, should *Turner* have led us astray, either the Congress or the Court can set us straight.

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No. 90 4812 HLH (Sx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL RIGGS,
Plaintiff,
vs.
SCINDIA STEAM NAVIGATION COMPANY, LTD.
AND SCINDIA LINES,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT
Date: November 25, 1991
Time: 10:00 a.m.
Courtroom of the Hon. Harry L. Hupp

This Court having considered defendants SCINDIA STEAM NAVIGATION COMPANY LTD. and THE SHIPPING CORPORATION OF INDIA's ("defendants") Motion for Summary Judgment and the evidence in support thereof, plaintiff MICHAEL RIGGS' opposition to the Motion for Summary Judgment and all response thereto, in addition to the arguments of counsel heard at the hearing of the insant motion on November 25, 1991, has concluded that no material factual issues are in existence and that summary judgment is appropriate and is therefore granted, dismissing plaintiff MICHAEL RIGGS' claims against defendants.

The Court notes that defendants' Motion for Summary Judgment presents only questions of law, not fact. The only issue of fact made out by plaintiff is on a matter irrelevant under the

applicable law and summary judgment must therefore be granted in defendants' favor.

Under the seminal case addressing the liability of vessel interests to a longshoreman under Section 905(b) of the Longshore & Harbor Workers' Compensation Act, *Scindia Steam Navigation Company, Ltd. v. De Los Santos*, 451 U.S. 156 (1981), in order for a plaintiff longshoreman to recover against vessel interests, the longshoreman must show that the defendant violated one of two relevant duties: (1) the duty to warn the stevedore of a non-obvious hazard aboard the vessel; or (2) the duty to turn over to the stevedore the vessel and its equipment in a reasonably safe condition. While there is a third possibility, in the form of a duty to intervene, that duty is not relevant under the facts of this case.

Based on the respective parties' Statement of Material Facts, it is undisputed for the purposes of this motion that the hazard which allegedly caused plaintiff's injury, the "helter skelter" condition of the stow of the cargo and the fact that the cargo had been covered with a slippery blue plastic sheeting, was open and obvious. Accordingly, the duty to warn is not implicated under *Scindia* inasmuch as the duty to warn exists on the part of the shipowner only with regard to hidden or non-obvious dangers. *Scindia, supra*, at 167; *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984); *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981). The Court takes specific notice of Judge Fletcher's opinion in *Turner, supra*, and notes that the *Turner* court spoke of the duty to warn in terms of a "duty to protect against *concealed* dangers." 651 F.2d at 1304 (Emphasis added). Plaintiff having conceded that the condition of the cargo which allegedly caused his injury was open and obvious, there is no question as to the applicability herein of the *Scindia* duty to warn.

With regard to the turnover duty of ordinary care, plaintiff sets forth no facts evidencing any unsafe condition of the vessel itself or its equipment. As noted above, the unsafe condition alleged was created by the manner of wrapping and stowing the cargo. Plaintiff does present respectable opinion testimony that the cargo was originally stowed in an unsafe manner, that the wrapping compounded the danger, and that the vessel JALAGOPAL's officers must have known of the danger. If this opinion were

relevant, it would prevent the granting of summary judgment inasmuch as the obvious nature of the danger would not preclude liability for an unsafe condition of the ship or its equipment. However, the cargo is not the vessel or its equipment, and plaintiff may accordingly not maintain his action based on a breach of the turnover duty of ordinary care. As is made clear in *Taylor, supra*, at 1386, and *Bjaranson v. Botelho Shipping Corp., Manila*, 873 F.2d 1207, 1208 (9th Cir. 1989), the turnover duty focuses on the character of the ship and its equipment, and not on the nature of the cargo. While *Turner, supra*, involved liability created by a condition of the stow, the facts of *Turner* involved a concealed defect, not an "open and obvious" one. Plaintiff has failed to cite any Ninth Circuit authority wherein the shipowner has been held liable for an unsafe condition of the cargo which was open and obvious to the longshoremen working the hold.

This Court additionally takes notice that the reason for the restrictive rules of liability of shipowners to stevedores is set forth in the policy of law which greatly enhances the stevedore's benefits under worker's compensation. That same law sought to achieve a balance by restricting the rights of stevedores to pursue actions against a shipowner on the theory that the stevedore should be able to handle obvious cargo conditions, absent hidden dangers, and absent unsafe vessel equipment.

The Court further finds that defendants' other theories on which summary judgment is sought, assumption of the risk and preclusion of a repairman recovering when injured by the condition he was hired to correct, are without merit and are not the basis for the granting of summary judgment herein.

The Court therefore finds that no issues of material fact exist so as to preclude summary judgment in favor of defendants and dismissing plaintiff's claims. Summary judgment is therefore granted.

IT IS SO ORDERED, ADJUDGED AND DECREED ON THIS 18TH DAY OF DECEMBER, 1991.

Dated: December 18, 1991

HARRY L. HUPP
HONORABLE HARRY L. HUPP
United States District Judge

ENTRY AND APPROVAL REQUESTED:
Dated: December 10, 1991

WILLIAM H. COLLIER, JR. (97491)
MICHAEL L. ARMITAGE (152740)
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Scindia Steam Navigation Company, Ltd.
and The Shipping Corporation of India

APPROVED AS TO FORM AND CONTENT
Dated: December 10, 1991
LAW OFFICES OF DIANE L. MIDDLETON

By: MARC COLEMAN/MLA
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(Per Telephone Authorization)